Supreme Court, U.S.
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No._____

In The

Supreme Court of the United States

NEAL S. FREEMAN,
Petitioner,
vs.
ALBERT CHARLES JOHNSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FOURTH DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Is a state civil appellate system subject to the constraints of the Fourteenth Amendment, and to what extent is an aggrieved party who proceeds with an appeal in accordance with a state's established civil appellate system protected with any right secured by the Constitution or laws of the United States?

2.

If subject to federal protection, do the state's appellate procedures as displayed in this case comport with due process and/or the right of meaningful equal access to the court?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, NEAL S. FREEMAN, prays that a writ of certiorari issue to review whether the California appellate process, as applied to his appeal from a jury verdict in a civil action for personal injury damages incurred in an automobile accident, violated the rights of equal access to the court, due process and meaningful opportunity to be heard that are guaranteed under the First, Fifth and Fourteenth Amendments to the U.S. Constitution.

To the extent that implicit in this question is whether federal law, under the U.S. Constitution, can compel any state to have a just and fair appellate system (civil or criminal), the issues presented here -- of whether federal law extends to ensure "justice for all" and "fair access" in state civil appeals -- are related to said issues raised (in the criminal context) in cases currently before this court of: *Martinez v. Court of Appeals of California, 98-7809* (granted certiorari on April 19, 1999 on the question of whether a criminal defendant has a constitutional right to elect self-representation on direct appeal from a judgment of conviction); *Smith vs. Robbins, 98-1037* (granted certiorari on March 8, 1999 on the question of whether California's no-merit brief procedure in criminal appeals in which defense counsel found no nonfrivolous issues for an appeal, violates the *Anders* right to effective assistance of counsel on appeal); and, *Roe vs. Ortega, 98-1441* (granted certiorari on May 3, 1999 on the question of whether trial counsel have a duty to file a notice of appeal following a guilty plea if the defendant has not so requested).

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JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257 which, in relevant part, reads:

> "(a) Final judgments or decrees rendered by the highest court of a State in which decision could be had, may be reviewed 0by the Supreme Court by writ of certiorari... where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege,

> or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

The California Supreme Court, the state's highest court, filed its order denying Freeman's petition for review of the appellate decision in question within 90 days of the filing of this petition, to wit, on March 9, 1999. [*infra*, App 1, Appendix "A"].

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MATTERS TO BE REVIEWED

Petitioner respectfully requests review of the following:

(1) The decision by the California Supreme Court to abstain from reviewing the opinion and "innovative" procedures in the appeal in question. [*infra*, App 1, Appendix "A"].

(2) The subject appellate opinion by California's Court of Appeal, Fourth District, Division Two [*infra*, App 2-9, Appendix "B"] and the announced "innovative procedures" used in reaching said decision. [*infra*, App 10-13, Appendix "C"].

(3) Since respondent argued that the subject appellate decision did not warrant review by California's Supreme Court because the opinion was deemed to be <u>not</u> "for publication," also presented for consideration, and included in the appendices herein, is California's scheme for publishing appellate opinions (California Rules of Court, rules 976-979). Appendix "D" [*infra*, App 14-15] are the enabling provisions for the rules, and Appendix "E" [*infra*, App 16-19] are the publication rules. (Note: under said scheme, California's appeal courts have virtually unrestricted power to *not publish* lower appeal opinions at will. California, moreover, permits its highest court to make appellate decisions disappear -- for all except the affected parties -- through directing *nonpublication* of an already published opinion, all without granting review, having to explain, or revealing the reasons.)

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

This case, which asks the court to look at the *caseload management procedures* applied in a California civil appeal, raises substantial concerns over denial of fundamental First Amendment rights of petition for redress of grievances and meaningful "equal access" to the courts as well as the rights guaranteed by the "privileges or immunities clause" and by both the procedural and the substantial "due process" provisions of the Fourteenth Amendment. The constitutional and statutory provisions and other rules involved are:

U.S. CONSTITUTIONAL PROVISIONS

Amendment I

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition Government for redress of grievances."

Amendment XIV, Section 1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS OF CALIFORNIA

Constitution of the State of California, Art. III, Section. 1:

> "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land."

Constitution of the State of California, Article VI, section 14:

"Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."

California Code of Civil Procedure, Section 901:

"A judgment or order in a civil action or proceeding may be reviewed as prescribed in this title. The Judicial Council shall prescribe rules for the practice and procedure of an appeal not inconsistent with the provisions of this title."

California Code of Civil Procedure, Section 902:

"Any party aggrieved may appeal in the cases prescribed in this title."

California Code of Civil Procedure, Section 904:

"An appeal may be taken in a civil action or proceeding as provided in Section 904.1"

California Code of Civil Procedure, Section 904.1:

"An appeal may be taken from the Superior Court in the following cases:

(a) From a judgment . . ."

CALIFORNIA RULES OF COURT RE: APPEALS

California Rules of Court, Appellate Rules, Rule 22:

"Unless otherwise ordered: (1) counsel for each party shall be allowed 30 minutes for oral argument, except that in a case in which a sentence of death has been imposed each party shall be allowed 45 minutes."

Enabling provisions for the formulation of appellate rules.

Due to their volume, they are annexed hereto as Appendix "D" [*infra App. 14-15*]. Please refer to same.

California Rules of Court for Publication of Appellate Opinions, rules 976-979.

To the extent that California rules for the publication of appeal opinions are a focus of this request for certiorari, said rules are set forth in their entirety in Appendix "E" [*infra*, App 16-20]. Please refer to said Appendix.

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STATEMENT OF THE CASE

Introduction

Every schoolchild in America learns that we are: "*One nation, indivisible, with liberty and justice for all*!" Said pledge seems to signal the existence of a federal mandate which guarantees that a federal concept of fundamental *justice* be applied across the land in every court system, including in a state civil appellate system -- recently re-affirmed principles of state sovereignty and states' rights notwithstanding. In *Alden vs. Maine*,____ No. 98-436 (decided on June 23, 1999), Justice Kennedy, writing for the court, observed: "Under the federal system established by the Constitution, the States retain a `residuary and inviolable sovereignty.'... They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not full authority, of sovereignty."

This case presents cause to explore whether the "*justice for all*" mandate is a limitation on state sovereignty and whether the mandate extends to a state's civil appellate system. Freeman contends that, as imposed against his interest in this case, California's appellate system was given effect in a way that is repugnant to the Constitution of the United States.

The federal questions presented by this petition were raised, pressed and passed on below as follows.

The Facts of the Case

The appended opinion of the Court of Appeal *[App 3-8]* adequately recites the background facts of this case insofar as they are pertinent to the issues raised here. Briefly, in 1990, Freeman was injured in an automobile collision caused by the negligence of Respondent Johnson. Over time, Freeman incurred a great deal of damage as a result of the injury he sustained because, among other things, the injury adversely affected his ability to work in his profession as an oral surgeon. Freeman sued Johnson to recover those damages. The case was tried to a jury and Freeman lost. Freeman attributed the trial loss to a number of judicial and legal errors that occurred in his case both before and during trial. Being the aggrieved litigant, he duly appealed the adverse verdict, as is his right under

California law. (The appeal was structured around three (3) separate and independent clusters of claimed error: one, prejudicial abuse of discretion in not allowing expert testimony, two, attorney misconduct that denied him a fair trial, and three, lack of substantial evidence to support the verdict.)

The appeal court, issuing a very brief opinion, upheld the jury's verdict which had found the defendant negligent in causing the accident but awarded no damages despite the plethora of credible, unrefuted evidence of significant personal injury damage arising from the accident. In a petition for rehearing Freeman submitted that the court had failed to address a number of essential issues raised in the appeal and that the "innovative and unusual" appellate process to which his appeal was subjected was constitutionally infirm and fatally flawed and deprived him of a fair process. To wit, the appeal court had -- after ordering him to negotiate for a settlement -- unreasonably taken away his opportunity to do so by issuing a "tentative opinion" on the eve of the court arranged mandatory settlement conference, and then unreasonably deprived him of adequate time to present needed oral argument, and finally, issued an unreasonably deficient opinion. Rehearing was denied, without comment, as was a separate motion to vacate submission of the cause in order to correct the alleged denial of "due process" in the appellate proceeding [see, Appendix "F" *infra*, App 20-29].

A timely Petition for Review in the California Supreme Court followed. It was denied without comment. [*App 1*]

How the Federal Questions Were Raised and Decided Below

To the Supreme Court of California, Freeman repeated the contentions he had made to the court of appeal in arguing for the need of a rehearing. That is, he urged:

(1) That the appeal opinion had been rendered under procedures so cursory, abbreviated and otherwise flawed that the decision to uphold the jury's verdict "*fails to meet the minimum standards of justice and fairness mandated for an appeal under California law and*

guaranteed by both the California Constitution and the Fourteenth Amendment of the United States Constitution."

(2) That his appeal raises important, undecided issues and conflicts in the law affecting public policy and/or the administration of justice which the opinion either neglects to discuss or misapprehends.

(3) That when an exhaustively briefed case, as was this one, is met with an inappropriately hasty and very sparse opinion it creates the suspicion that the case did not receive the judicial attention it deserved and that such apparent cursory treatment alone demonstrates a likely need for review. Freeman pointed out that the court's opinion is barely eight (8) pages long, though he had filed a 50-page opening brief that was countered by a response brief of substantially equal length and was retorted by a 45-page reply brief. He submitted that he had briefed his case with such care in order to make all significant aspects of the questions raised by the appeal clear. Moreover, the hastiness with which the opinion was handed down was highly inappropriate. As described below, the court gave its "tentative opinion" (which eventually became its formal opinion) prior to the court-ordered mandatory settlement conference, and limited oral argument to an inadequate ten minutes, and then issued its final opinion a mere two working days later.

Though the opinion acknowledges a meticulously briefed case (a "minutely recounting" of the evidence and issues [*at, App. 9*]), the court's treatment of the matter does not reflect a carefully briefed appeal. Unexpectedly, the appellate court met said extensive briefing with a series of remarkable announcements, communications and orders. His counsel considered them to be of such significance that same were presented to the California Supreme Court as "unusually important evidentiary exhibits" pursuant to California's Rules of Court, Rule 28(e)(6)(iv) [which allows for evidentiary exhibits on matters of unusual significance]. Central to said evidence of "unusual significance" was (is) the publication, "*Innovative Programs at 4th District, Division 2*" which spells out the various procedures to which Freeman's appeal was subjected. Said exhibit is reproduced in this petition as Appendix "C" hereto [*infra, App 10-13*].

Efficient caseload management is the admitted aim of the court in implementing its "innovative programs." Describing its "Backlog Reduction and Case Management" program, the court reports that, through the implementation of its *innovative programs*, it has increased the number of opinions filed each month "by an average of almost 50 percent becoming one of the most productive in the state." It reports further that despite "steady increases in filings" and "no additional resources" it has been successful in keeping its calendar current [*App 10-11*]. In footnote in his petition for review, Freeman asked: What decrease in the quality of appeal decisions, if any, is an acceptable price for increased efficiency? With a higher caseload and no additional justices, what variable allows the court to file 50% more opinions? He answered: the conclusion is obvious: *the quality of its opinion!*

The progress of Freeman's appeal advanced in accordance with the appeal court's "*innovative programs*." The initial orders from the court, after the case was fully briefed, was notification that the appeal was being considered for the appeal court's "Mandatory Settlement Conference Program." The parties were ordered to submit a confidential settlement statement. A week or two later, the parties were advised that the appeal was selected for the court's settlement program, and the parties were told to prepare for and attend a mandatory settlement conference with a court appointed mediator a month hence, that is, on September 29, 1998. Freeman complied in both spirit and law with all such orders. Relying on the court's programs and orders and on its presumed good will in fostering and encouraging settlement, he labored to achieve a negotiated resolution of his appeal. All possibility of achieving settlement was, however, dashed when, on the eve of the scheduled settlement conference, the court of appeal issued a "tentative opinion" affirming the judgment. Thereupon, of course, the court vacated its settlement conference order. A month later, it set the appeal on its oral argument calendar, scheduled for December 2, 1998.

Given the court's "tentative opinion," Freeman viewed oral argument as a vitally needed opportunity to address the justices on the

many and substantial defects he saw in the "tentative opinion." He prepared resolutely for a comprehensive oral argument. Then, less than two weeks before the scheduled hearing, the court issued another surprising order. To wit, the court limited oral argument to "no more than ten (10) minutes," explaining that it had an "extraordinarily heavy" argument calendar. Predictably, because of the many perceived omissions of fact and law in the "tentative opinion," Freeman felt that his appeal could not be adequately argued in only ten (10) minutes. He asked for more time. Though California appellate rules [California Rules of Court, rule 22] expressly provide for an allowance of 30 minutes for oral argument for each side, Freeman's request for more time was denied.

On December 2, 1998, Freeman orally argued his position as best he could within the strict limitation set. A mere four days later (which included a weekend), the court filed its formal opinion in the case, an opinion that is essentially unchanged from the unsigned "tentative opinion" (seemingly, a bench-memorandum prepared by a law clerk) that the court had issued months before.

Appendix "F" [*infra*, App 20-29], the motion to vacate submission of the cause in order to correct the denial of "due process" in the appellate proceeding, sets forth the facts and arguments Freeman submitted in support of his position that he has been denied constitutionally guaranteed due process.

In addition to the above described defects in the procedures to which his appeal was subjected, Freeman also complained that the opinion itself is unreasonably deficient in several ways. To wit:

(1) The opinion glosses over the essential aspect of the substantial evidence point of error with the unwarranted assessment that the key issue in that regard was the dispute over the cause of the bone spur. [*infra*, App 8]. Ignoring the more than half a dozen other items of uncontested personal injury damage caused by the accident, the opinion noted that there was some conflict in the evidence on the cause of the bone spur and upheld the verdict with the conclusion that, therefore, there was some substantial evidence to support the verdict of a "non-injury" accident. Freeman contends that such misreading of

an issue and side-stepping of important evidence on a major point of appeal is unjustified and renders the opinion defective. To wit, the appeal court made no determination whether, given the evidence, the jury could reasonably conclude that the accident had caused no personal injury damage of any kind.

(2) Freeman also complained that the opinion is unreasonably deficient in that it fails to address essential question of whether the speculative musings of the defendant's medical expert on the possible causes of a bone spur, rose to the level of substantial evidence.

(3) A central tenet of Freeman's appeal was that the explanation for the return of a verdict so grossly disproportionate to the evidence lies in the fact that the jury's view of the case was so poisoned by the combined prejudicial effect of errors, missteps and "irregularities" amounting to positive misconduct in defense-counsel's argument to the jury that impartial deliberation became impossible, making the trial fundamentally unfair.

Freeman had gone to great lengths in his briefs to describe each various, different "irregularity" and its circumstance and effect. The opinion glosses over the point with a boilerplate recitation of the rule that such errors is generally waived by the failure to object and the plain conclusionary assertion that the harmful effect could have been prevented by an objection that prompted the trial judge to instruct the defense counsel to "alter his behavior" [infra, App. 7-8]. (Since the complained-of "irregularities" constituted a different type of behavior in each instance, it is impossible to understand, without explanatory comment, how the appeal court concluded that an objection, or a series of objections, would have cured the harm.) Freeman explained in his briefs that he elected not to object to the various incidents of misconduct that occurred in front of the jury because he believed that, under the circumstances, objecting would not have cured the harm and would have made the problem worse. He emphatically pointed the court to the recent California decision of *People vs. Hill* (1998) 17 Cal. 4th 800 where the conviction and death penalty of an accused murderer was reversed by a unified California Supreme Court because "the cumulative prejudice flowing from the combination of prosecutorial misconduct and other errors rendered defendant's trial

fundamentally unfair" [supra, 815]. The case is a powerful illustration of the proper procedure for reviewing claims of attorney misconduct when the complaint is raised for the first time on appeal. Note that the opinion [Appendix B] does not purport to have scrutinized the claims of misconduct that Freeman described to determine their context. Moreover, the opinion is silent on whether the review procedure, followed in *People vs. Hill,* has application to this case.

(4) A second key tenet of Freeman's appeal is that it was unfair and senseless to stigmatize his case with the litigation error his former attorney made when such error is easily cured, without prejudice to the other side, by a simple corrective order from the court. Freeman complains that he was unfairly prejudiced in presenting his case because the jury was not permitted to hear the expert testimony of his biomechanical engineer. He submits that the trial court erred in not allowing him to cure the inexcusable mistake of his former attorney of not designating the expert in a timely manner. In his briefs, he pointed the court to *Fleming vs. Gallegos* (1994) 23 CA 4th 68, for the view that the old rationale, of holding the client to his/her attorney's error, does not apply when the mistake is easily cured with a corrective action from the court that does not prejudice the other side. The opinion disposes of the contention by simply reiterating the old rationale that "the attorney's inexcusable mistake is charged to the client, and the client's remedy is to sue his attorney" There is no discussion of the view, enunciated in *Fleming.*

In concluding his petitions for a rehearing and review of his appeal, Freeman acknowledged that, possibly, the court's reluctance to take on review of complicated legal issues is the result of an overburdened calendar and/or is due to the innovative monitoring of its caseload and insure against the development of a backlog. He also acknowledged that efficiency in the management of an overburdened caseload is a necessary and laudable goal for any court. But, he argued, the need for efficiency cannot trump the necessity for fair and just resolutions of the disputes that come before the court in accordance with the rule of law.

Respondent Johnson answered Freeman's petition in the California Supreme Court. A primary contention in his answer was

that further review of the opinion is not warranted under California's appeal system because the opinion had *not been "deemed for publication"* by the appeal court. Respondent argued that the discretionary power of review was, per se, not called upon, since the California Supreme Court traditionally grants review "only to secure uniformity of decision or to settle an important question of law" and the unpublished opinion had no value as a legal precedent and, thus, no impact on the law or the public.

Freeman's reply to that answer is set forth in Appendix "G" [*infra App 31-42*] hereto. He submitted, *inter alia*, that respondent's contention that an opinion does not warrant review because *the appellate court had deemed the opinion to be "not for publication"* raised a new, important, question for review concerning the constitutionality of California's publication rules [*infra*, App 16-19 Appendix "E"]. Freeman submitted that, if deciding *not to publish* the opinion immunized it from review by the California Supreme Court, it meant the exercise of the power to decide not to publish in the opinion in his case had effectively impeded, if not barred, his access to the higher court. As such, Freeman urged, the *discretion to deem an opinion to be "not for publication"* that is enjoyed by California's appeal courts, per California's rules for the publication of opinions, is essentially an invisible, basically unrestricted and unscrutinizable power to affect, impede, limit or bar a party's rightful access to the state's highest court. He argued that this violates not only constitutional "due process" concerns, it also impermissibly infringes upon the fundamental First Amendment right of petition for redress of grievances, federal rights ensured to him by virtue of the Fourteenth Amendment. [See, *infra* App 32-36].

The petition for review was denied. [App 1].

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ARGUMENT
REASONS FOR GRANTING CERTIORARI

Freeman urges this court to grant certiorari in order to address the undetermined question of the extent to which federal law can interfere with state mandates pertaining to their appeal systems and decide

whether *civil* litigants in state appeal proceedings have federally guaranteed rights to fair and equal access to their state appellate courts and to a "due" and fair appeal process.

The Importance of the Case

The question is an important one. Particularly in this time of great flux in the appellate systems all over the country --because of the huge caseload burdens-- the issue of "due" justice in the appeal process is of immense concern to all who use the appellate courts of this land. To wit, *The New York Times*, headlining the concern as: "CASELOAD FORCES TWO-LEVEL SYSTEM FOR APPEALS COURTS" in a front page article by William Glaberson on March 14, 1999, reports as follows:

> "A crushing load of cases is forcing a reshaping of the federal appeals courts, creating a two-level justice system in which tens of thousands of appeals receive limited reviews, judges and legal scholars say. (¶) ... Critics say the (lower) appeals courts are changing their role, with people's legal rights often damaged by the shift. (¶) Instead of reviewing every case that comes before them, as federal law requires, ... the (lower) appeals courts are becoming more like the Supreme Court, which has the power to decide which cases it will hear.(¶) ... (E)ntire classes of appeals deemed routine... get abbreviated attention as staff lawyers sort out cases to recommend for full hearings. (¶) In one of the most controversial changes, the appeals courts created new staff lawyer positions ... with authority to screen and, some critics say, to effectively decide thousands of cases by giving judges brief summaries of recommended decisions. (¶) ... One measure of the abbreviated treatment given to many cases, some judges and scholars say, is a sharp decline in the number of decisions that (lower) appeals courts publish in law books. Unpublished decisions do not establish precedents."

The problematic changes in appeal court procedures that *The New York Times* article reports on are, of course, not restricted to the federal appeals court system. The abbreviated appeal procedures described in the article, or some version thereof, are playing out across the country. Freeman's case is a paradigm of these "shortcuts." According to *The New York Times* article, well informed voices, like the National Association of Criminal Defense Lawyers, assert that said caseload management shortcuts are "diminishing the public's confidence in the courts." The question of whether the "shortcuts" comport with our hallowed notion of *justice for all* is put squarely to the court. Though the problem of trying to do "due" justice in the face of crushing caseloads is endemic, a case like this reaches the court rarely. The opportunity to address this important issue, now, should be seized.

The Mandate to "Do What is Fair"

In California's Fourth Appellate District, Division Two, as in jurisdictions all over the country, the managing of caseloads is fundamentally reshaping the duly established appeal system, and the reshaping is being done without benefit of legislatively enacted directives. Today's courts are all overburdened. Numerous prescriptions for managing crushing caseloads have been fashioned. Undeniably, courts must be given considerable discretion in determining how their calendars are managed. In exercising discretion, jurists have traditionally been guided by the mandate to "do what is fair." Certainly, prudence and fairness should guide the molding of the discretion to manage caseloads. But, the power to manage the judicial caseload cannot be limited by discretion alone. Judicial procedures are subject to legislation, and the Constitution is the bounds.

That appeal rights are creatures of legislation is well known. As is true for the federal judicial system, in California, the appellate procedure is entirely statutory and subject to complete legislative control. [*Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Powers v. City of Richmond*, 10 Cal 4th 85, 105-108 (1995)]. That does not mean,

however, that there are no constitutional restrictions imposed on appellate jurisdictions, once the right to appeal has been created.

There is Authority, Cause and Reason to Hold Established State Civil Appellate Systems to the Constraints of the Fourteenth Amendment

This court has frequently held that while there is no per se constitutional right to appeal, once a state establishes an appellate forum it must assure "due process" and "meaningful access" upon terms and conditions equally available to all. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Murray v. Giarranto*, 942 U. S. 1; also see, *Lewis v. Casey*, 516, U.S. 804 (1996). While it is true that recognition of constitutional protections in the appeal process have usually been confined to the criminal context, the concept of a constitutional right of appeal in a purely civil context was recognized in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). Writing for the court in a 6-to-3 decision, Justice Ginsburg found that a state may not, consistent with the due process and equal protection clauses of the 14th Amendment, condition appeals from decrees terminating parental rights on the ability to pay record preparation fees.

Moreover, that protecting the fundamental rights, privileges and immunities of United States' citizens is a duty compelled on the states through the Fourteenth Amendment was re-affirmed in *Saenz v. Roe*, ___ No. 98-97, 119 S. Ct. 1518 (1999). In a 7-to-2 decision, the court resurrected the rarely cited "privileges or immunities" clause of the Fourteenth Amendment to strike down a California law that restricted welfare benefits for those who move to the state from other states. Justice Stevens, writing for the court, emphasized that an aspect of the fundamental right to travel, guaranteed by the First Amendment, was at stake and found that this right is also protected by the new arrival's *status as citizen of the United States*. Justice Steven's writes: "That additional source of protection is plainly identified in the opening words of the Fourteenth Amendment:

> 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make

or enforce any law which shall abridge the privileges or immunities of citizens of the United States;... ""

Like the right to travel, the right to petition for redress of grievances, the right of fair access to the courts, and the right to due process are all fundamental rights guaranteed to every citizen of the United States. If the court's reasoning in *Saenz v. Roe* is followed, it leads to the conclusion that, where a state has established a particular judicial system, the "privileges or immunities" clause insures that the state provides "fair access" and protects "due process" to every citizen of the United States. As the *Saenz* court pointed out, the "privileges or immunities" protection of the Fourteenth Amendment is given in addition to the protection offered in the "due process" clause.

Petitioner's "Due Process" Rights Were Infringed During the Appeal Proceedings Before the California Courts

Due process is a flexible concept, and must be tailored to the requirements of each particular situation. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." (*Cafeteria Workers v. Mcelroy* (1961) 367 U.S. 886, 895.) The rudiments include notice, an opportunity to respond, and a hearing. The rule is grounded upon the principle that property may not be taken without due process of law.

Traditionally, in every due process challenge (based on the "nor shall any State deprive any person of life, liberty, or property, without due process of law" clause), the first inquiry is whether the aggrieved party has been deprived of a protected interest in "property" or "liberty." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Only after finding the deprivation of a protected interest does the court look to see if the state's procedures comport with due process. While the right of appeal is not per se a constitutionally protected, due process requires fair procedures for the adjudication of all claims in state authorized judicial, or quasi-judicial proceedings. See for instance, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-431 (1982); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478,

485 (1988). There is no reason why an appeal claim should be treated differently. There is surely no doubt that a duly established state appeal court acts clothed with the authority of the State.

Also, when it comes to "due process" concerns in an appeal proceeding, there is no reason to treat a civil litigant differently from a criminal defendant. True, the criminal has his/her "liberty" at stake in the proceeding, while the civil litigant has only "property" is involved. But, both "liberty and "property" are protected by the "due process" clause. The controversy is over an award of money in a civil damage law suit, whether the claim is being litigated in a trial court or is at risk in a duly authorized appellate proceeding. See, e.g., *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) ("It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined"); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 262, and fn. 8 (1970). Surely, Freeman possess a constitutionally protected "property" interest in the damage claim he seeks to have vindicated in the appeal process. Indeed, it is the justice and fairness of the judicial process that he relies on in bringing this controversy to the court.

As pressed to the California courts (see discussion above (pages 8-13), under the heading, "How the Federal Questions Were Raised and Decided Below," the *case management procedures* employed by the California Court of Appeal, deprived Freeman of procedural "due process." It did so by issuing a too hasty and too cursory opinion, an opinion which fails to address many essential facts and issues presented for review on appeal. He was also denied the "due" process" he relied on when his right to present oral argument was unreasonably abbreviated.

Freeman also argued that substantive "due process" rights were infringed as well. This was done when the court cut off, without "due process," the *court-created, and court-mandated*, opportunity to settle his case. Under settled rules of law, since the appellate court ordered the settlement conference and provided the opportunity to achieve settlement, Freeman had a vested right to proceed with the

planned settlement conference. The taking of that vested right is a breach of substantial due process. He likens his position vis-à-vis the court to that of a real property owner whose governmentally granted and vested opportunity to improve his property is cut off without "due process."

For instance, where a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete the work in accordance with the terms of the permit. (*Russ Bldg. Partnership v. City and County of San Francisco* (1988) 44 Cal.3d 839, 845-846, app. dism. *Sub Nom. Crocker National Bank et al. v. City and County of San Francisco* (1988) 488 U.S. 881.) Freeman's situation of not being allowed to complete the court ordered settlement conference program is not unlike the situation encountered by the property owner who was not allowed to finish his work in accordance with the terms of the permit the government gave him. By obeying the court's order and submitting confidential settlement forms, proposals, etc., and by being ready and prepared for a mandatory settlement conference, Freeman had attained a vested right to be allowed to complete the settlement program. The court's abrogation of the settlement program by issuing a premature tentative opinion was an unconstitutional taking of that vested interest. Both cases are grounded upon the constitutional principle that property may not be taken without due process of law.

Petitioner's "Meaningful Equal Access" Rights Were Infringed During the Appeal Proceedings Before the California Courts

The California Constitution, Article VI, §14, provides that: "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." It is respectfully submitted that, if the opinion in this case was the product of a research attorney, without adequate review or input by the tribunal charged with judging the matter, (as appears possible given the circumstances of this appeal), the constitutionally guaranteed "access" to the court was infringed.

There is an additional reason why Freeman complains that his right of "access" to the court was unconstitutionally infringed. He asserts that his "access" to California's Supreme Court was impeded, if not cut off altogether, by the lower appellate court's decision that his appeal did not deem publication in the law books. Freeman submits that for, the reasons stated below, California's appeal opinion publication scheme is unconstitutional.

The respondent argued to the California Supreme Court that Freeman's appeal did not warrant the discretionary attention of the highest court in the state because the appellate opinion was unpublished and, as such, did not impact the law. Opinions that determine cases based on already established rules of law need, perhaps not be published because the rule already exists. But, when an appeal raises essential issues that are undecided in the law, or need clarification by the courts, the opinion the court renders should address those issues. And, if the opinion establishes a previously unrecognized rule, or alters or modifies an existing rule, such opinion should be (and historically is required to be) published so that all others can be guided by it, and the newly created rule is not a "judicial secret." Freeman contends that the opinion in his appeal, had it been properly handled, would have been publishable.

By "not publishing" an opinion, the appeal court greatly reduces the chance of having its decision reviewed. The increasing use of unpublished or depublished opinions shows that the discretion to publish is being used as an expedient method of "managing" the court's burdened docket. The Court's power to not publish its opinions is virtually unlimited. Cal. Const., Article VI, §14, provides simply that court of appeal opinions shall be published "as the Supreme Court deems appropriate." Though, in theory, anyone may petition to have an unpublished opinion published, if reason for publication can be demonstrated [Rule, 978, *App 18*], privilege is a hollow one. If an opinion is written so as to avoid its publication, it is difficult to see how an appropriate standard for publication can be demonstrated. It is the Supreme Court's practice <u>not</u> to state reasons for its orders concerning publication or depublication of appellate opinions.

The high court has, furthermore, declined all invitations (and there have been many) to speak on the publication and depublication practice.

Petitioner respectfully submits that not adequately reviewing his case, and not publishing the opinion has impermissibly infringed his fundamental First Amendment right of petition for redress of grievances and of equal access to the court. *See, California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972) ("The right of access to the courts is indeed but one aspect of the right to petition"), which reaffirms that the "fundamental right of access to the courts is well-established," which includes the right of equal access to appellate courts where the state chooses to provide appellate review.

CONCLUSION

In conclusion, it is noted that a gradual evolution within the appellate courts over a period of many years has eroded the basic and important function of the appeal procedure. That evolution represents an effort to blend the appellate objectives of error-correcting and law-shaping with administrative necessity of managing caseloads. The days when reviewing courts addressed every possible fact and theory raised in a cause before it may have come to an end, but appellate procedures cannot be allowed to become so abbreviated as to prevent proper analysis.

Petitioner respectfully submits that there is no sufficient "rational reason" for the *selective abandonment* of the "due" appellate process to which his case was subjected. In its application to this Petitioner said abandonment of the proper appeal procedure is repugnant to the Constitution of the United States.

This case presents a clear example where the bounds of the Constitution were exceeded in managing a caseload.

___o___

WHEREFORE, for these various reasons, Petitioner, NEAL S. FREEMAN, prays that this Honorable Court grant this Petition and issue its Writ of Certiorari.

Respectfully submitted,

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Attorney at Law
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Counsel of Record
for Petitioner, Neal S. Freeman

APPENDIX "A"

SUPREME COURT OF CALIFORNIA ORDER

Fourth Appellate District, Division Two, No E 018977
S076076

IN THE SUPREME COURT OF CALIFORNIA

NEAL S. FREEMAN,
Appellant,

vs.

ALBERT CHARLES JOHNSON,
Respondent.

SUPREME COURT
FILED
March 9, 1999

Robert Wendruff, Clerk

Deputy

Petition for review DENIED.

GEORGE,

Chief Justice

APPENDIX "B"

CALIFORNIA APPEALS COURT OPINION

FILED
Dec 07, 1998

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

NEAL S. FREEMAN,

Plaintiff and Appellant,

v.

ALBERT CHARLES JOHNSON,

Defendant and Respondent.

E 018977
(Super.Ct.No.SCV - 261866)

OPINION

APPEAL from the Superior Court of San Bernardino County. Jeffrey King , Judge. Affirmed.

Johnson Flyer & Harrison, David R, Flyer and Erika W. Senter for Plaintiff and Appellant.

Cassidy, Warner Lane & Winstead, Bruce A. Winstead and David C. Olson for Defendant and Respondent.

A plaintiff in an action for damages for personal injury appeals from a defense judgment entered against him after a jury trial. We affirm.

BACKGROUND AND CONTENTIONS

In March 1990, Neal Freeman, his fiancee and her children were in Freeman's car, waiting to enter the parking lot of a recreational site in the San Bernardino Mountains, when he was rearended by a car driven by Albert Johnson. In February 1991, Freeman sued Johnson for damages for personal injuries allegedly suffered by Freeman. Following a jury trial in April 1996, the jury unanimously found that although Johnson had been negligent, that negligence had not caused any harm to Freeman.

In chronological order, Freeman contends that (1) the trial court prejudicially abused its discretion when it denied his motions to augment his designation of expert witnesses, (2) the defense counsel committed prejudicial misconduct during closing argument, and (3) the jury verdict is not supported by substantial evidence. We find no merit to any of those assertions.

DISCUSSION

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED FREEMAN'S REQUESTS TO AUGMENT HIS EXPERT WITNESS LIST.

Trial was originally set for August 1993. In accordance with Code of Civil procedure section 2034, subdivision (f), the parties exchanged their respective designations of expert witnesses in July 1993. [1] Johnson designated a biomechanical engineer. Freeman did not. Nor did Freeman within 20 days thereafter designate an expert witness on biomechanics in a supplemental expert

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1. All further section references are to the Code of Civil Procedure.

witness list, as permitted by subdivision (h) of section 2034.

For various reasons, the trial date was continued to September 1994. In May of that year, freeman discharged his lead trial counsel. In July 1994, Freeman's secondary counsel moved to withdraw its representation and continue the trial to permit Freeman to retain new counsel. In August 1994, the trial court granted the motion to withdraw but apparently denied the motion for a continuance.

Freeman promptly renewed his motion for a continuance, this time in propria persona, and also moved to augment his expert witness list to designate an expert in biomechanical engineering. The trial court continued the trial date to November 1994 but denied the request to augment the expert witness list.

Freeman promptly renewed his motion for a continuance, this time in propria persona, and also moved to augment his expert witness list to designate an expert in biomechanical engineering. The trial court continued the trial date to November 1994 but denied the request to augment the expert witness list.

Freeman renewed his augmentation request in October 1994 when Johnson moved for a further continuance of the trial after Freeman had surgery to repair injuries allegedly suffered in the accident. The trial court continued the trial to April 1995 and reopened discovery regarding Freeman's damages, but again denied the request to add a biomechanical engineer. Freeman made another request for leave to augment in November 1995. Although no ruling appears in the record, he represents that request was denied as well.

Freeman argues that the trial court prejudicially erred by denying those repeated requests for augmentation. He is mistaken.

A court may grant a motion to augment an expert

witness list only if either (1) the need to designate the additional witness could not have been reasonably foreseen or (2) the failure to designate the witness was the result of a mistake, inadvertence, surprise, or excusable neglect. (§ 2034, subd. (k).) As the party seeking relief, Freeman had the burden of affirmatively proving the existence of one of those two bases for relief by a preponderance of competent evidence. (Cf. *Kendall v. Barker* (1988) 197 Cal.App.3d 619,623-624 [regarding relief under § 473].)

Freeman's initial motion in August 1994 is not supported by any declaration or any other evidence whatsoever. His October 1994 motion is supported by a lengthy declaration by his new attorney, but it offers no evidence to indicate that the former attorney's failure to designate an expert in biomechanics was the result of excusable mistake or neglect. To the contrary, it suggests that the decision to exclude such an expert was deliberate. Freeman's third and final request for augmentation, in November 1995, is also supported by a declaration. But like that submitted in support of the October 1994 motion, it again declares that the failure of the former attorney to designate an expert in this field was the result of mistake, inadvertence or neglect without offering any evidence to supp0rt that conclusion.

In short, there is no evidence to establish excusable neglect. In the absence of that evidence, any error by the prior attorney is inexcusable. The general rule is that inexcusable neglect of an attorney "'is imputed to his client and may not be offered by the latter as a basis for relief.' [Citation.] The client's redress for inexcusable neglect by counsel is, of course, an action for malpractice." (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892,898, quoting from *Buckert v. Briggs* (1971) 15 Cal.App.3d 296,301.)

Freeman notes that there is an exception to the general rule denying relief. "'[E]xcepted from the rule

are those instances where the attorney's neglect is of that extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence. [Citations omitted.] The exception is premised upon the concept the attorney's conduct, in effect, obliterates the existence of the attorney-client relationship, and for this reason his negligence should not be imputed to the client.'" (*Carroll v. Abbott Laboratories, Inc, supra*, 32 Cal.3d at p. 898, quoting from and adding emphasis to *Buckert v. Briggs, supra*, 15 Cal.App.3d at p. 301.) This exception applies when there has been "a total failure on the part of counsel to represent the client: each attorney had de facto substituted himself out of the case. Under such circumstances it would have been unconscionable to apply the general rule charging the client with the attorney's neglect." (*Carroll*, p. 900; and see, e,g,, *Fleming v. Gallegos* (1994) 23 Cal.App.4th 68.)

That exception has no application here. The failure to designate a particular type of expert witness does not amount to "a total failure on the part of counsel to represent the client...." (*Carroll v. Abbott Laboratories, Inc., supra*, 32 Cal.3d at p. 900 [reversing grant of § 473 relief by trial court].)

In the absence of any evidence to support Freeman's assertion that the failure to designate an expert in biomechanics was an excusable mistake rather than an intentional and deliberate tactical decision, the trial court properly denied each of the three requests for augmentation.

Nor has Freeman demonstrated that the trial court should have granted the request on the basis of a change of circumstances creating the need for an expert which could not have been reasonably foreseen. The only changed circumstance urged by Freeman is the neck surgery which he underwent in October of 1994. But as Freeman concedes in his opening brief, that

surgery changed only the circumstances of the injury, and therefore did not affect the subject matter of the proposed expert's opinion, which was the cause of that injury. Besides, how can one say that the need for a biomechanical engineer could not have been reasonably foreseen prior to the surgery when Freeman had not only foreseen that need but asked for leave to augment his expert witness list to include such a witness long before the surgery occurred?

B. THE CLAIMS OF MISCONDUCT BY DEFENSE COUNSEL HAVE BEEN WAIVED BY FREEMAN'S FAILURE TO OBJECT.

Freeman contends that defense counsel engaged in numerous instances of misconduct during closing argument, the cumulative effect of which was prejudicial. However, any error which may have occurred has been waived by Freeman's failure to object.

A party who becomes aware of misconduct prior to or during the course of proceedings should not be able to speculate on the chance of obtaining a favorable outcome by remaining silent, while at the same time preserving his or her objection in the event the judgment is adverse. (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 103 [misconduct by jurors].) To prevent such speculation, the "well settled" rule is that if a party "becomes aware of facts constituting misconduct or irregularity in the proceedings..., he must promptly bring such matters to the attention of the court, if he desires to object to it, or he will be deemed to have waived the point as a ground for a motion for a new trial." (Ibid.) Specifically, the party must make a timely and proper objection and must request that the jury be admonished to disregard the impropriety. (*Sabella v. Southern Pac. Co.* (1969) 70

Cal.2d 311, 318 [misconduct by counsel]; *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757,796 [same].) Claims of misconduct may not be urged for the first time on appeal where the prejudice created thereby could have been but was not prevented or cured by timely objection in the trial court. "Only when an admonition could not remove the prejudicial effect, or it is apparent that a request would be fruitless, can the complaining party dispense with objecting." (*Chyten v. Lawrence & Howell Investments* (1994) 23 Cal.App.4th 607, 1620 [misconduct by judge].)

As Freeman concedes, he neither objected to the alleged misconduct nor requested jury admonitions. He claims that he should be excused from the requirement to do so on the ground that no admonition would have cured the cumulative harm caused by the misconduct. He argues that "while the isolated unfair comment might be rendered harmless by a corrective instruction, "no amount of admonitions could have overcome "the cumulative effect of the pervasive campaign to mislead the jury on key legal points...." He is mistaken.

The purpose of an objection is not only to have the jury admonished to disregard any misconduct that has already occurred, but also to instruct counsel to avoid repetition of the misconduct and thereby "forestall the accumulation of prejudice by repeating improprieties...." (*Horn v. Atchison, T.&S.F. Ry. Co.* (1964) 61 Cal.2d 602,610.) The cumulative prejudice resulting from the repetition of the allegedly improper conduct could have been prevented by an objection which prompted the trial judge to instruct the defense counsel to alter his behavior and avoid further instances of misconduct. Freeman cannot sit by while minor misconduct accumulates into reversible error without taking steps to stop the misconduct from being repeated.

C. SUBSTANTIAL EVIDENCE SUPPORTS THE JUDGMENT.

The key issue regarding causation was whether the bone spur for which Freeman underwent surgery in 1994 was caused by the accident in 1990. On that issue, there was substantial but conflicting evidence. For instance, Freeman's neuroradiologist testified that the accident was the "most likely" cause of Freeman's injury. Freeman's surgeon was more definite, testifying that the surgery was a "direct result" of the accident. By contrast, Johnson's neuroradiologist testified that the injury was probably caused by Freeman's every-day activities, and that it was unlikely that the accident caused Freeman's bone spur.

Minutely recounting this and other evidentiary conflicts on the issue of causation, Freeman in effect urges us to find that his evidence is more persuasive and thus the evidence supporting the jury's conclusion that Freeman's injuries were not caused by the accident is insufficient. That is not our province and that is not the test of substantial evidence. While the evidence would also have supported a verdict in Freeman's favor, the evidence supporting the defense verdict is nonetheless substantial.

DISPOSITION

The judgment is affirmed. Johnson shall recover his costs on appeal.

NOT FOR PUBLICATION

McKINSTER
Acting P.J.

We concur:

RICHLI
J.

WARD
J

APPENDIX "C"

APPEAL COURT'S ANNOUNCEMENT OF ITS SPECIAL PROCEDURES PROGRAM

Innovative Programs at 4th District, Division 2
Backlog Reduction and Case Management

In January 1996, Division Two had a backlog of approximately 300 fully briefed cases that had not yet been assigned for preparation of an opinion, resulting in delays of up to an additional year beyond the norm in civil cases. The court had been expecting an increase in justices and/or legal staff to deal with the backlog since it began to grow in 1990--no additional justices, and only one attorney in 1991 and another for 1996, had been authorized since 1987 despite steady increases in filings. But when it became plain that the additional resources would not be forthcoming, the justices concurred in a common sense plan developed by the presiding justice to reduce the backlog and resulting delays of up to an additional year beyond the norm in civil cases.

The first objective was to prevent the further growth of the backlog by estimating the actual number of fully briefed cases the court would receive monthly and assigning all of those cases to the chambers and staff.

The second objective was to reduce the backlog by additional case assignments beyond what was necessary to prevent backlog growth. The court looked at several different levels of case assignments, balanced the need for backlog reduction against the impact of the additional work on the justices and legal staff, and determined that the backlog could be reasonably reduced over a two-year period. The appropriate assignments were planned, the justices agreed on the work increase, and the plan was presented to court personnel.

Led by the united justices and supported by a determined staff, the court met the monthly goals and increased the number of opinions filed each month by an average of almost 50 percent becoming one of the most productive courts of appeal in the state. Almost all cases are now assigned to chambers within a month after they have

been fully briefed with little, if any, backlog in the chambers. The court continues to set case assignments according to an estimate of the number of cases coming fully briefed and to monitor its caseload to insure against the development of a new backlog.

Civil Appeal Docketing Statements

The First District Court of Appeal in San Francisco and Divisions One and Two of the Fourth District Court of Appeal in San Diego and Riverside require docketing statements to be filed in civil appeals within 10 days after filing the notice of appeal. The docketing statements are used for some or all of a number of purposes depending on the court: to dismiss untimely appeals and appeals from nonappealable orders and judgments; to focus the parties on the orders or judgments, or parts thereof, that are appealable; to consolidate or coordinate related cases; to expedite appeals with priority; to stay appeals in actions against debtors in bankruptcy; and to specify the parties to, and the title of, the appeal.

Division Two's program is unique in two ways. First, a senior central staff attorney, who has specialized in jurisdictional and procedural aspects of appellate law, scrutinizes each notice of appeal, docketing statement, and attached judgment or order appealed. The court believes that a specialized and experienced attorney provides the most accurate and expeditious review of the technical issues involved in each civil appeal.

Second, the court's policy is to dismiss without prejudice appeals from nonappealable orders rather than attempting to create an appealable judgment from a nonappealable order. (See *Shpiller v. Harry C's Redlands* (1993) 13 Cal.App .4th 1179-1180; *Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, 1608-1610.) Thus, appeals from orders sustaining demurrers without leave to amend and from orders granting summary judgment are routinely dismissed without prejudice to filing a new notice of appeal when an order or judgment of dismissal or summary judgment is entered.

Tentative Opinion Program

Every court of appeal in California, and most intermediate appellate courts throughout the country, prepare a "bench

memorandum" prior to oral argument. These memoranda often take the form of draft opinions and often become the final opinion of the court with little, if any, modifications. The great majority of appellate courts do not send the draft opinion to counsel prior to oral argument, and, as a result, counsel are completely unaware of the court's initial response to the arguments in their briefs and do not know how to focus their oral argument. Consequently, oral argument is often a dry, meaningless ritual in which counsel merely review the arguments set forth in their briefs. To improve the quality and relevance of the oral argument experience, the justices of this court in October 1990 started mailing the preliminary draft of the opinion which they called the "tentative opinion" to counsel seven to ten days before oral argument. As a result, the justices of this court have found oral argument more useful in assisting the court to reach a decision. The justices do not sense that their deliberations are any less objective than before the tentative opinion program began. Counsel almost unanimously praise the program.

Issuance of the tentative opinion before oral argument has significantly reduced the time spent on oral argument in two ways. First, argument has become more focused and taken less time as counsel can concentrate on the issues found significant by the court. Second, counsel often decide to waive oral argument once they see the court's tentative opinion. Thus, the program has increased both the quality and efficiency of the court resulting in a savings to taxpayers.

Volunteer Attorney Mediator Civil Appellate Settlement Program

After a four-month trial run in 1991, this court commenced its civil appellate settlement program using volunteer attorney mediators. Eighty mediators were selected from among the most respected attorneys in the Riverside and Riverside County bar. The court focused the program on fully briefed appeals that had not yet been assigned to a chambers. The volunteer mediators removed approximately 300 civil appeals from this court's backlog over a period of five years saving taxpayers hundreds of thousands of dollars. In recognition of that success and the program's efficiency,

the Chief Justice of the Supreme Court and Judicial Council honored the program in 1996 with a *Kleps Award* for innovative judicial programs.

As the court became current in the assignment of civil appeals for preparation of an opinion, the court shifted the settlement program focus to pre-briefing cases. The Presiding Justice now screens cases when the docketing statement is filed, and assigns about 30 percent of the cases selected to the settlement program. Once elected, participation is mandatory. Mediators specializing in the area of law involved in the appeal are matched with the case. The mediators often spend several hours prior to the first settlement conference reviewing the settlement statement provided by the parties and the record when necessary. The conferences are held at the court, and the mediators often require the parties to return for additional negotiations after the initial meeting. The percentage of cases settled has risen over the life of the program from 30 percent of the cases in which one or more settlement conferences are held to 40 percent.

APPENDIX "D"

ENABLING PROVISIONS FOR THE RIGHT OF APPEAL IN THE CONSTITUTION OF CALIFORNIA

Constitution of the State of California, Art. VI, Sect. 6.

The Judicial Council consists of the Chief Justice and one other judge of the Supreme Court, 3 judges of courts of appeal, 5 judges of superior courts, and 5 judges of municipal courts, each appointed by the Chief Justice for a 2-year term; 4 members of the State Bar appointed by its governing body for 2-year terms; and one member of each house of the Legislature appointed as provided by the house. . . . To improve the administration of justice the [Judicial] council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, not inconsistent with statute.

...

Constitution of the State of California, Art. VI, Sect. 12.

(a) The Supreme Court may, before decision, transfer to itself a cause in a court of appeal. It may, before decision, transfer a cause from itself to a court of appeal or from one court of appeal or division to another. The court to which a cause is transferred has jurisdiction.

(b) The Supreme Court may review the decision of a court of appeal in any cause.

(c) The Judicial Council shall provide, by rules of court, for the time and procedure for transfer and for review, including, among other things, provisions for the time and procedure for transfer with instructions, for review of all or part of a decision, and for remand as improvidently granted.

(d) This section shall not apply to an appeal involving a judgment of death.

Constitution of the State of California, Art. VI, Sect. 14

The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person. Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.

APPENDIX "E"

CALIFORNIA RULES OF COURT FOR PUBLICATION OF APPELLATE OPINIONS

California Rules of Court, Introductory Statement

The Judicial Council is established under article VI, section 6, of the Constitution of California, and is given various powers and responsibilities to improve the administration of justice. ... *All of the California Rules of Court have the force of law.* Under its authority granted by article VI, section 6, of the Constitution to "make recommendations to the courts," the Judicial Council has adopted "Standards of Judicial Administration Recommended by the Judicial Council" ("standards").

_____o_____

Rules for Publication of Appellate Opinions

(Adopted by the Supreme Court of the State of California, effective January 1, 1964, pursuant to the authority contained in California Constitution, Article VI, Section 14; and Government Code Section 68895.)

Rule 976. Publication of Appellate Opinions.

(a) [**Supreme Court**] All opinions of the Supreme Court shall be published in the Official Reports.

(b) [**Standards for Publication of Opinions of Other Courts**] No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:

(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;

(2) resolves or creates an apparent conflict in the law;

(3) involves a legal issue of continuing public interest; or

(4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

Amended Nov. 11, 1966; Jan. 1, 1972; Jan. 1, 1983.

(c) [**Publication Procedure**]

(1) [**Courts of Appeal and Appellate Departments**] An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision's finality in that court, that it meets one or more of the standards of subdivision (b).

(2) [**Supreme Court**] An opinion certified for publication shall not be published, and an opinion not so certified shall be published, on an order of the Supreme Court to that effect.

Amended Nov. 11, 1966; Jan. 1, 1972; Jan. 1, 1983.

(d) [**Superseded Opinions**] Unless otherwise ordered by the Supreme Court, no opinion superseded by a grant of review, rehearing, or other action shall be published. After granting review, after decision, or after dismissal of review and remand as improvidently granted, the Supreme Court may order the opinion of the Court of Appeal published in whole or in part.

Relettered Jan. 1, 1972; amended Jan. 1, 1983; May 6, 1985.

(e) [**Editing**] ... {*omitted as not relevant*} ...

Rule 976.1. Partial Publication.

(a) [**Partial Publication Authorized**] A majority of the court rendering an opinion may certify for publication any part of the opinion that meets the standard for publication specified under subdivision (b) of rule 976. The published part shall indicate that part of the opinion is unpublished. All material, factual and legal, that aids in the application or interpretation of the published part shall be in the published part.

Adopted Jan. 1, 1983.

(b) [**Other Rules Applicable**] For purposes of rules 976, 977, and 978, the published part of the opinion shall be treated as a published opinion, and the unpublished part as an unpublished opinion.

(c) [Copy to Reporter of Decisions] One extra copy of both the published and unpublished parts of the opinion shall be furnished by the clerk to the Reporter of Decisions.

Adopted Jan. 1, 1983; amended Jan. 1, 1984.

Rule 977. Citation of Unpublished Opinions Prohibited;

(a) [**Unpublished Opinions**] An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

(b) [**Exceptions**] Such an opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

(c) [**Citation Procedure**] ... {*omitted as not relevant*} ...

Adopted Jan. 1, 1974; amended Jan. 1, 1983.

(d) [**Opinions Ordered Published by Supreme Court**] An Opinion of the Court of Appeal ordered published by the Supreme Court pursuant to rule 976 is citable.

Adopted May 6, 1985.

Rule 978. Requesting Publication of Unpublished Opinions

(a) [**Request Procedure; Action by Court Rendering Opinion**] A request by any person for publication of an opinion not certified for publication may be made only to the court that rendered the opinion. The request shall be made promptly by a letter stating concisely why the opinion meets one or more of the publication standards. The request shall be accompanied by proof of its service on each party to the action or proceeding in the Court of Appeal. If the court does not, or by reason of the decision's finality as to that court cannot, grant the request, the court shall transmit the request and a copy of the opinion to the Supreme Court with its recommendation for disposition and a brief statement of its reasons. The transmitting court shall also send a copy of its recommendation and reasons to each party and to any person who has requested publication.

Adopted July 1, 1975; amended Jan. 1, 1983; July 1, 1992.

(b) [**Action by Supreme Court**] When a request for publication is received by the Supreme Court pursuant to subdivision (a), the court shall either order the opinion published or deny the request. The court shall send notice of its action to the transmitting court, each party, and any person who has requested publication.

Adopted July 1, 1975; amended Jan. 1, 1983.

(c) [**Effect of Supreme Court Order for Publication**] An order of the Supreme Court directing publication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached

by the decision or of any of the law set forth in the opinion.

Adopted July 1, 1975.

Rule 979. Requesting Depublication of Published Opinions

(a) **[Request Procedure]** A request by any person for the depublication of an opinion certified for publication shall be made by letter to the Supreme Court within 30 days after the decision becomes final as to the Court of Appeal. Any request for depublication shall be accompanied by proof of mailing to the Court of Appeal and proof of service to each party to the action or proceeding. The request shall state concisely reasons why the opinion should not remain published and shall not exceed 10 pages.

Adopted July 1, 1990.

(b) **[Response]** The Court of Appeal or any person may, within 10 days after receipt by the Supreme Court of a request for depublication, submit a response, either joining in the request or stating concisely reasons why the opinion should remain published. Any response shall not exceed 10 pages and shall be accompanied by proof of mailing to the Court of Appeal, and proof of service to each party to the action or proceeding, and person requesting depublication.

Adopted July 1, 1990.

(c) **[Action by Supreme Court]** When a request for depublication is received by the Supreme Court pursuant to subdivision (a), the court shall either order the opinion depublished or deny the request. The court shall send notice of its action to the Court of Appeal, each party, and any person who has requested depublication.

Adopted July 1, 1990.

(d) **[Limitation]** Nothing in this rule limits the court's power, on its own motion, to order an opinion depublished.

Adopted July 1, 1990.

(e) **[Effect of Supreme Court Order for Depublication]** An order of the Supreme Court directing depublication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion.

Adopted July 1, 1990.

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APPENDIX "F"

FREEMAN'S MOTION IN COURT OF APPEAL TO VACATE SUBMISSION OF CAUSE IN ORDER TO CORRECT THE DENIAL OF "DUE PROCESS" IN THE APPELLATE PROCEEDINGS

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

NEAL S. FREEMAN,

Plaintiff and Appellant,

v.

E 018977
(Super.Ct.No.SCV - 261866)

ALBERT CHARLES JOHNSON,

Defendant and Respondent.

Motion to Vacate Submission of the Cause in Order to Correct the Denial of "Due Process" in the Appellate Proceeding

(This Motion is associated with and a corollary to Appellant's Petition For Rehearing filed on December 22, 1998)

COMES NOW APPELLANT, NEAL S. FREEMAN, and respectfully moves the court for an Order, pursuant to CRC, rule 22.5(b), to vacate submission his above referenced cause on appeal so that the denial of "due process" occasioned by the taking of the court-created, vested opportunity to negotiate a settlement of his cause, and/or by the taking of his right to a reasonable and fair chance to present oral argument on his appeal can be corrected.

A.

THERE IS GOOD CAUSE FOR THE MOTION

Good cause exists for presenting this motion for an order vacating the submission of this appeal because the included

declarations and attached documents, which are material to the request and which evidence the need for it, could not have been brought to the attention of the court within the customary confines of a normal Petition for Rehearing.

Good cause also exists for granting the motion. An order vacating the submission of this appeal would serve the interests of justice and would further the appearance judicial fairness, in that parties would be afforded the reasonable opportunity to avail themselves of the rights, privileges, and grants that were given them by statute, law or the court.

There is additional good cause for granting this motion in that it is in the furtherance of judicial economy to cure flaws in proceedings as soon the need, or advisability, for corrective action becomes known. After all, it is far better, and far more efficient, to vacate the submission of the defective appeal and take corrective action, than it is to force the issue to be taken up to the higher court for a directive command to that effect. The simple remedy of vacating the submission of the appeal and assigning the cause to another panel for determination is far more economical than forcing the appeal into additional litigation in yet a higher court. Restoring to the parties some semblance of a fair playing field on which they could try to settle their dispute through court assisted negotiation (as the court had initially ordered) and providing them a reasonably fair opportunity to present their oral argument is the sensible resolution of the problem.

B.

THE COURT HAS POWER TO GRANT THE MOTION

Because neither a trial of lawsuit, nor an appeal, "is a game where the spoils of victory go the clever and technical regardless of the merits, but a method devised by civilized society to settle peaceably and justly disputes between litigant." [Justice Baxter, in *Adams v. Murakami* (1991) 54 C.3d 105, 120], trial judges and appeal justices alike are given considerable latitude to apply the rules of law in such a way as to avoid injustice and unfairness. *Moles v. the Regents of University of California* (1982) 32 C. 3d 867, 872 points out that: "Mistakes, errors, fallacies and flaws elude us in spite of ourselves unless the case is pounded and hammered at the Bar."

Knowing that a case often needs additional "hammering at

the Bar," even after a decision is rendered, the Court of Appeal, wisely was given 30 days to hammer at will at a case ostensibly decided. "A decision of a Court of Appeal becomes final as to that court 30 days after filing" its decision in a case. [CRC, rule 24]. If the court, in that 30-day period, discovers that a case needs more "hammering" than could be done in the 30 days, CRC, rule 22.5 (b) grants the court power to vacate the submission of the appeal, so that more pounding and hammering on the errant case can be done.

This is a case that needs such additional pounding and hammering, for the following reasons:

C.

THE UNFAIRLY AND UNREASONABLY ABBREVIATED ORAL ARGUMENT SCHEDULE DENIED APPELLANT DUE PROCESS

Oral argument can be "the chance to make a difference in result," the court said in Moles v. the Regents of University of California (1982) 32 C. 3d 867, 872. That chance, the court said, "is extremely valuable to litigants. If oral argument is to be more than an empty ritual, it must provide the litigants with an opportunity to persuade those who will actually decide an appeal. Clearly, oral argument cannot provide this opportunity if the judges who hear the argument are not the ones who decide the case. If "those who hear" are not "those who decide," oral argument is meaningless, and the right to oral argument no right at all."

If the opportunity to present oral argument is too abbreviated to make the right meaningful in the context of the case that is to be decided, the right becomes an empty ritual, as well. CRC, rule 22 recognizes the right to present oral argument and provides, "Unless otherwise ordered: (1) counsel for each party shall be allowed 30 minutes for oral argument, except that in a case in which a sentence of death has been imposed each party shall be allowed 45 minutes. . . ." It is to be assumed that the drafters of that provision considered a reasonable allowance for oral argument to be 30 minutes.

Here, the court limited argument to a mere ten (10) minutes and inflexibly applied that restriction to all appeals heard on its December calendar where the court had predetermined, without consulting with the parties, that no oral

argument was necessary. Such indiscriminate "taking" of a precious and highly valued right, because the court, apparently, had scheduled too many cases for a hearing, seems not only very unfair, it is a violation of the rule grounded upon the constitutional principle that vested rights or property may not be taken" without due process of law."

In *Cal-American Income Property Fund VII, v. Brown Development Corporation* (1982) 138 CA 3d 268, a trial court allowed only five (5) minutes of oral argument in a pretrial skirmish over authorization to allow a receiver to sell a shopping center. Reversing the sale on other grounds, Division One of the Fourth Appellate District reflected that, "abbreviated" oral argument may impair due process rights [footnote 3 at page 273] and gave recognition to the benefits of argument enunciated in *Moles v. the Regents of University of California* (1982) 32 C. 3d 867, 872; *People v. Brigham* (1979) 25 C. 3d 283, 285-289, saying:

> "So serious a matter as the appointment of a receiver should not be made without a full and complete hearing unless the due administration of justice clearly requires it." (*Cohen v. Herbert* (1960) 186 Cal.App.2d 488, 495.) We need not decide here whether the court's ruling limiting argument impaired [the Appellant's] due process rights. Although we understand oral argument may not be the sine qua non for accurate judicial decision-making, *had [the Appellant] been given more time to argue, counsel might have been able to shed more light on the issue and furnished more information to the court to reflect upon before ruling*. Our admonition to the trial court to expand time allowed for oral argument in those complex law and motion cases where the decision has an immediate and dramatic impact upon the parties is no more than a reminder to ourselves that the quality and appearance of justice is always improved when a judge listens before he or she decides." [Emphasis added.]

An appeal decision certainly has a dramatic impact on the parties. Surely, it is every bit as serious a matter as a pretrial motion, and a dispute over causation of serious bodily injury is

no less momentous than a skirmish over the sale of a shopping center. Like the aggrieved party in the shopping center skirmish, had Freeman been given more time to argue, he might have been able to shed more light on the issue and furnished more information to the court to reflect upon before ruling. Most definitely, the appeal is an event of high moment for Freeman. Every phrase and each word of the briefs was of keen interest to him. He took a very active part in the preparation for oral argument and agonized in the frustrating attempt to craft a ten-minute presentation that could begin to touch on the most important aspects of the many problems of his case. He was in the courtroom when his case was argued. He was there when his counsel pleaded for more time, and when that plea was denied. The seemingly deaf ear that the court gave his case was perhaps the "unkindest cut of all." The unquiet disillusionment at a justice system that had failed him so would not be calmed by the wisdom of the appeal court, after all. It appears, to litigants like Freeman, that justice is not only blind, but also deaf.

Freeman is convinced that, if there had been time to "breathe life" into his case, if therÖhad been time to shed light on some of the circumstances and background that led to the appeal, if there had been time to explain his position a little more fully, it could and would have made a difference in the outcome of his case.

One of the main purposes of oral argument is supposed to be the opportunity to talk about the case in ways that could not have been briefed. It is the chance to talk about the "soul" of the case. *Moles vs. Regents, supra* at 877 holds:

> "Oral argument provides the only opportunity for a dialogue between the litigant and the bench. As a result, "it promotes understanding in ways that cannot be matched by written communication."

Knowing what great frustration Freeman felt at not having been able to present to the court his forceful statement of where he feels the logic, the soul, the essence of this case lies, I asked him to put his thoughts on the matter in writing so they could be submitted to the court in non-spoken form. His view of the case is not only forceful and logical, as a layman he

speaks with compellingly soulful frankness and clarity. As the concerned party who has experienced every aspect of this case first hand, Freeman's observations deserved a hearing at oral argument. It is a presentation of the case that could, and would, have been made at oral argument had there been time.

The 8-page letter, attached hereto as Exhibit "A" which is incorporated herein by reference is a true and correct copy of the writing I received from my client, Neal S. Freeman, in response to my suggestion that he put his observations on the case in writing so they can be presented to the court as evidence of what the oral argument would have been had there been sufficient time to say it.

D.

HAD THE COURT HEARD AND DISCUSSED FREEMAN'S PERSONAL VIEWS OF THE CASE IT MIGHT WELL HAVE MADE A DIFFERENCE IN THE DECISION

The thoughts and comments presented in that letter [EXHIBIT "A"] together with (in more skeleton form) the argument presented in the petition for rehearing that was filed on December 22, 1998, comprise what Appellant's oral argument would have been had his time for argument not been so drastically abbreviated. Ideally, oral argument is supposed to be a dialogue between justices and counsel on the case that is about to be decided.

While these writings cannot approximate the give and take and flow of oral argument, they serve to give the court some idea of what the panel would have heard and what the justices would have had to consider had the chance for oral argument not been cut short. Because Freeman's views and observations on his case are relevant to the issues on appeal and are well-taken, chances are that the benefit derived from hearing them, and discussing them, with his counsel at oral argument would have had some impact on the justices' decision making process. But, even if the personal views of the party most directly affected by the appeal would have made no difference in the outcome, he had a right to have his views of the process expressed to the court at oral argument. That opportunity, in and of itself, was very valuable to him. As he writes in the initial big paragraph of his letter: "I did not want to go down

completely in flames without expressing the true facts of this case and seeing if anyone out there is listening."

The "true facts," as Freeman describes them, are that he suffered grave injustices in this case not once, not twice, not three times, but four times. First, he suffered at the hands of his own attorneys, Blum and Crandall, who made the poor legal decision of not timely naming a needed expert for trial and then "withdrawing" from the case (he did not fire them) and abandoning their client at a critical stage in the case without fixing their error. The error turned out to be highly prejudicial to Freeman's case, who was left without a remedy.

As Freeman points out the logic of saying, you are stuck with the poor decisions your attorneys made and your remedy is to sue them, is not comprehendible in the real world. In fact, it sounds like pure nonsense. His reference, on the last page of his letter, to the *Fleming* case [*Fleming vs. Gallegos* (1994) 23 CA 4th 68] is worth noting. That is a case which held that it doesn't make sense to bind a blameless client to the error of his attorney when said error is easily cured, without prejudice to the other party, through corrective action by the court. The mention of the case is his acknowledgment that courts, too, sometimes see the nonsense of the supposed "punish the attorney" rule. Modernly, there is a serious question of whether a client, whose case is harmed due to his former attorney's inexcusable error, suffers "actionable injury" as that phrase is interpreted in modern legal malpractice law, if the attorney's error could be easily cured by corrective action from the court. One wonders, if the harm done is not an "actionable injury" within the meaning of malpractice law, how can the wronged client's remedy ever be a malpractice suit against the former attorney?

Freeman also suffered an injustice at the hands of the court that bound him to his attorney's error by repeatedly declining to correct that error. Next, he suffered at the hands of defense counsel, who resorted to various maneuvers and tricks and acts of misconduct in order to "win the game." Finally, he suffered greatly at the hands of this court because the appeal process has failed to give his case a fair look.

E.

THE COURT'S ABROGATION OF ITS OWN SETTLEMENT ORDER IS ANOTHER INSTANCE OF A DENIAL OF DUE PROCESS

At the start of his letter Freeman writes: "The rendering of a tentative opinion on the eve of a settlement conference took away any last vestige of trying to achieve some recovery to mitigate even a portion of the damage done to me." Under settled rules of law, since the court ordered the settlement conference and provided the opportunity to achieve settlement, Freeman had a vested right to proceed with the planned settlement conference. The taking of that vested right is also a breach of due process.

Due process is a flexible concept, and must be tailored to the requirements of each particular situation. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." (*Cafeteria Workers v. Mcelroy (1961) 367 U.S. 886, 895.*) However, the rudiments of fair play include notice, an opportunity to respond, and a hearing. The rule is grounded upon the constitutional principle that property may not be taken without due process of law.

For instance, where a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete the work in accordance with the terms of the permit. (*Russ Bldg. Partnership v. City and County of San Francisco* (1988) 44 Cal.3d 839, 845-846, app. dism. Sub Nom. *Crocker National Bank et al. v. City and County of San Francisco* (1988) 488 U.S. 881.)

Freeman's situation of not being allowed to complete the court ordered settlement conference program is not unlike the situation encountered by the property owner who was not allowed to finish his work in accordance with the terms of the permit the government gave him. By obeying the court's order and submitting confidential settlement forms proposals, etc., and by being ready and prepared for a mandatory settlement conference, Freeman had attained a vested right to be allowed to complete the settlement program. The court's abrogation of the settlement program by issuing a premature tentative opinion

was an unconstitutional taking of that vested interest. Both cases are grounded upon the constitutional principle that property may not be taken without due process of law.

CONCLUSION

By being prevented from completing the court arranged settlement conference program in which he was ordered to participate, Freeman was deprived of a significant vested right, without due process. The court's sharply abbreviated, inflexible oral argument schedule likewise deprived him of the important right to present meaningful oral argument of his case to the court. These deprivations are curable with an order to vacate the submission of his appeal. Such an order would be fair and just and workable. For all the reasons stated, Appellant, NEAL S. FREEMAN, requests that his motion be granted.

Dated: January 4, 1999

Respectfully submitted,

_____

ERIKA W. SENTER
Attorney for Neal S. Freeman

[attached declaration
and exhibits ommitted]

APPENDIX "G"

FREEMAN'S REPLY TO ANSWER TO PETITION FOR REVIEW IN THE CALIFORNIA SUPREME COURT

In the
CALIFORNIA SUPREME COURT

NEAL S. FREEMAN,
Appellant,

vs.

ALBERT CHARLES JOHNSON,
Respondent.

S076076

FILED
Feb. 22, 1999

REPLY TO ANSWER TO PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

COMES NOW the plaintiff/appellant below and petitioner herein, NEAL S. FREEMAN. D.D.S., ("Freeman") and, pursuant to California Rules of Court, Rule 28(d), replies to the additional issues for review presented by Respondent's ANSWER TO THE PETITION FOR REVIEW that was filed in this matter on or about February 9, 1999. To the questions for review presented by the Petition [page 1], Respondent's Answer has added the following issues.

To what extent, if any, does the decision of a lower appellate court not to publish its opinion dictate or control the Supreme Court's determination to review or not review the opinion?

*Note: This interesting question for review is presented by the following passages in Respondent's Answer: "The [appellate] court deemed that the opinion was not for publication. (emphasis in the original) [Answer, pg. 2:6]. Moreover, this Court of Appeal's decision, which is not to be published, has no precedential value and will not apply to any other litigants other than the parties involved in this case." [Answer, pg. 2:21-23]

Is a policy of zero tolerance for deliberate deceptions on a court a mandate of proper administration of justice which the court cannot allow to be ignored?

*Note: The basis for this question for review is compelled by the following passage in Respondent's Answer which, once again [Freeman contends there is a pattern], constitutes a deliberate deception on the court on a material issue: "Although counsel for the appellant requested additional time, he made absolutely no showing for the need of additional time, under the circumstances, either by way of written request prior to the scheduled date for oral argument or orally at the hearing."[Answer, pg. 4:2-4].)

THE ADDED REASONS WHY REVIEW SHOULD BE GRANTED
(ARGUMENT IN REPLY TO AND SUPPORT OF RESPONDENT'S ADDITIONAL ISSUES)

In his Petition for Review, Freeman identified three (3) jurisdictional defects in the appellate decision in question (the limiting of the right to present oral argument so severely as to make the right unmeaningful, the failure to address in the opinion all essential issue of the appeal and the erroneous analysis of what constituted the key issue of the appeal) and

presented two (2) important, unsettled questions of law of strong public interest that deserve the attention of the court (when is it an abuse of discretion to punish a blameless client for the errors of his former attorney, and what is the proper review procedure when a claim of attorney misconduct is raised for the first time on appeal). In calling attention to, and pinning down, the additional, important issues that this case presents as afore-stated, the Answer to the Petition underscores and highlights why this case should be granted review.

Freeman agrees that Respondent's newly identified issues deserve Supreme Court consideration and replies as follows:

A.

REVIEW IS NEEDED TO CONSIDER AND DECIDE WHETHER, AND TO WHAT EXTENT, AN APPEAL COURT ABROGATES THE RIGHT OF REVIEW OF AN APPEAL OPINION AND/OR AFFECTS THE REVIEW PROCESS BY A DECISION TO NOT PUBLISH AN OPINION THAT IS OR COULD BE "PUBLISHABLE" UNDER CRC, RULE 976(b).

In his Answer [at page 2], Respondent says that the appeal opinion does not warrant review because "the appeal court deemed that the opinion was not for publication." It is, of course, true that only published decisions have stare decisis effect. Only published opinion can be cited. Therefore, unpublished opinions have no precedential value and little or no effect on the development of the law. (See, CRC rule 977 which prohibits the citation of unpublished opinions.) Though CRC rule 976(b) outlines the requirements for publication, there is no set requirement for the "nonpublication" of an opinion. As a result there is immense confusion in the legal community on the elements that factor into how and why and by what standards a decision on publishing or not publishing an appellate opinion is made. Despite the numerous invitations to speak on the issue, this court has remained absolutely silent on the subject.

California's "publication" law, whether in the form of "nonpublication" or "depublication," has drawn considerable comment and criticism from legal scholars as well as the judiciary and the bar. The issue cries out for word from this court. This unsettling subject should be addressed and settled.

1.

What judicial duty, if any, is there to not avoid review of the publishable issues raised in an appeal for the sake of rendering the opinion "not for publication."

Freeman believes that, had all the essential issues raised in his appeal been properly addressed in the opinion, the opinion amply would have met the standards for publication set forth in CRC rule 997(b). That being so, he submits that the opinion should have been published and the failure to publish may have frustrated and/or diminished his opportunity to gain further review of the errors in his opinion.

The power to publish or not publish appeal opinions is virtually unlimited. Cal. Const., art. VI, ᵴ 14, provides simply that court of appeal opinions shall be published "as the Supreme Court deems appropriate." Moreover, though the Cal. Const., art. VI, § 14, provides that: "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated," it is this court's practice not to state reasons for its orders concerning publication or depublication of appellate opinions. The subject remains a locked secret. The appellate procedures provide no rules for seeking review of a decision not to publish an opinion.

Since, in Freeman's view, the opinion in his case (if correctly decided) would eminently have qualified it for publication, on several grounds, under the standards provided in Rule of Court 976(b), the lack of a full review of all the issues raised in the appeal (as is argued in the Petition for Review) can also be explained as a tactic to avoid the requirements of publication and thereby do away with any need or reason for further review. Making sure that an opinion is

written so it can be deemed to be "not for publication" is indeed a very efficient way of dealing with the problem of overcrowded court calendars, but -- if Respondent is correct that unpublished opinions do not need review -- the avoidance of the need to publish an opinion also cuts off an aggrieved party's access to the supreme court. Freeman, respectfully, submits that a purposeful avoidance of a duty to publish impermissible infringes his fundamental First Amendment right of petition for redress of grievances and of equal access to the court and due process guaranteed by the Fourteenth Amendment. See, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("The right of access to the courts is indeed but one aspect of the right to petition") which reaffirms that the "fundamental right of access to the courts is well-established," which includes the right of equal access to appellate courts where the state chooses to provide appellate review.

In raising the issue of whether an unpublished opinion is properly deemed less worthy of review than a published one, Respondent invites the court to speak on this important matter.

2.

Respondent's question on the "review worthiness" of unpublished opinions brings into the foreground for review the important unsettled, and much debated, issues concerning California's publication rules.

That California's rules for the publication of appellate opinions [CRC, rules 976-979] is a subject of much debate and confusing signals from the court which is in great need for explanation and clarification is an understatement. In *People vs. Hill* (1998) 17 Cal 4th 800 [which has been discussed extensively in this appeal for other reasons] this court added to the confusion by instructing, in footnote 9 of the opinion, that taking judicial notice of an unpublished opinion "does not run afoul" of (CRC) rule 977 which prohibits the citation of unpublished opinions. (It is difficult to see how asking the court to take judicial notice of an opinion is different from

citing an opinion to the court.) A brigade of critics have written on the nonpublication practice, calling for, at least, an explanation from the courts, if not an end to the practice.[1] In a well-researched treatise on the subject. Howard Slavitt, writing for the Harvard Civil Rights-Civil Liberties Law Review, submits that nonpublication "destroy(s) equal access to the system of precedent," and "hinders the possibility of receiving a grant of review." He further maintains that: "In addition to

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1. Eg., STEPHEN R. BARNETT, *Depublication Deflating: The California Supreme Court's Wonderful Law-Making Machine begins to Self-Destruct*, 45 HASTINGS L. J. 519 (1994); *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. LA L. REV 1033, (1993). Professor Barnett believes depublication exceeds the constitutional power that is granted the courts and that "nonpublication" is, in any event, undermined by computer-age legal research. J. CLARK KELSO, *A Report on the California Appellate System*, 45 HASTINGS L. J. 433 (1994) at 496: Professor Kelso thinks depublication "is a practice that should be stopped." He condemns the unfairness of the practice, noting, at 491, that systems of nonpublication "bestow an unfair advantage" on litigants who possess the resources to collect unpublished opinions so as to exploit, "sub silento," their status as actual precedent. GERALD F. UELMEN, *Depublication: The Paper Trail Leading to a Depublication Should be Accessible to Everyone*, LA LAW (Aug.-Sept. 1990) at 55.

Professor Uelmen writes extensively on the subject and particularly decries the "secret" nature of the practice and notes that the increase in nonpublication closely correlates to a decrease in the grants of review by the Supreme Court. HOWARD SLAVITT, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication and Vacatur*, 30 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW, 109 (1995)., at, 109-110, writes: "The Due-Process Clause protects the integrity of the dispute-resolving role, but there is no corresponding constitutional guarantee to protect the integrity of the courts' law expounding function. This lack of systematic safeguards threatens the judiciary's ability to make principled decisions. The widespread use of effacing precedents -- selective publication, depublication, and vacatur motions -- evidences the need to protect the judiciary's law-expounding function."

undermining the appearance of justice, nonpublication interferes with the separation of powers between the judicial and political branches." He says, "because nonpublication often hides the actual state of the law it may substantially reduce the possibility of legislative reversal." He sees a threat to the separation of powers doctrine caused by nonpublication of appeal opinions: "Part of the justification for allowing a counter-majoritarian judiciary to interpret laws is that, except on constitutional issues, legislatures can overrule courts. Thus nonpublication may prevent legislatures from adequately policing judicial abuses." [2]

As said, despite the immense interest in and confusion of how and on what basis decisions to publish or not to publish appellate opinions are made, this court has remained absolutely silent on the subject. An open and full discussion from the court on this unsettling subject is much needed.

B.

REVIEW IS ALSO NEEDED TO CONSIDER AND DECIDE THE IMPORTANT PUBLIC POLICY ISSUE, RAISED BY RESPONDENT'S CLAIMS IN HIS ANSWER, OF WHETHER PROPER ADMINISTRATION OF JUSTICE MANDATES THAT THERE BE ZERO TOLERANCE FOR DELIBERATE DECEPTIONS ON A COURT.

A central theme of Freeman's appeal is that he has been denied justice and a fair trial, and a fair hearing of his appeal, because various deliberate and material deceptions on the court by opposing counsel (as well as his own former counsel) have been ignored or have otherwise gone unheeded. As discussed in detail below, the problem has now arisen again in the Answer that Respondent has filed to the Petition for Review in this court. Freeman believes, maintains and respectfully submits that any deliberate untruth presented to a

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See (footnote 1), Slavitt, supra, at 119, 127, 133

court of law is a grave and dangerous assault on justice which cannot, and should never be, ignored or treated lightly by the court, but that the assault on the integrity of the court and peril to the system of justice is all the more grievous if the deception (whether consciously deliberate or merely inexcusably careless) is by counsel. More than a mere witness or party, counsel is charged with a duty to present a case fairly and honestly to the court. An attorney has the professional obligation to uphold and preserve the integrity of the justice system. When it is the attorney, an officer of the court, who lies or otherwise practices deception, the very appearance of justice is in peril. It is a peril to fairness and justice that is so serious that any contention, proceeding, ruling or holding infected by such deception becomes stigmatized and must be regarded as suspect.
Freeman sees a number of misstatements and untruths in the characterization of the evidence that the Answer presents for this court's review. A particularly significant falsehood, in terms of the present petition, is the deliberate falsehood concerning oral argument in the court of appeal. The untruth is a glaring one and is especially injurious because it attempts to undercut, by deception, Freeman's claim that he was, through no fault of his own, denied the important right of a meaningful opportunity to present oral argument because the time given to present his needed argument was too short to be meaningful under the circumstances of this case.

To wit, though counsel for Respondent was present at the hearing and personally witnessed the events of which he speaks, he falsely represents the events and circumstances of oral argument as follows: "Although counsel for appellant requested additional time, he made absolutely no showing for the need of additional time, under the circumstances, either by way of written request or prior to the scheduled date or orally at the hearing." [Answer, 4:2-4].

The representation is false and deceptive as made clear by the following declaration, under oath, by Attorney David R. Flyer, counsel for Freeman, who represented him at oral

argument in this matter. The original of this declaration is attached as an exhibit to this brief:

Declaration of Attorney David R. Flyer re: Oral Argument in Appeal No. E-018977 on behalf of Appellant

I, DAVID R. FLYER, make the following declaration, concerning the highly material issue of the court imposed limitation on oral argument in this matter, to address the false and misleading contention submitted in Respondent's Answer to the Petition for Review (page 4, lines 2-4) that: "Although counsel for the appellant requested additional time, he made absolutely no showing for the need of additional time, under the circumstances, either by way of written request prior to the scheduled date for oral argument or orally at the hearing."

1. I am an attorney at law duly licensed to practice law before all the courts of this state, and I know the following to be true of my own knowledge and could and would competently testify thereto if called as a witness.

2. At all herein relevant times I served as co-counsel with Attorney Erika W. Senter in representing Neal S. Freeman, DDS., in the appeal of his case to the Court of Appeal, Fourth District, Division Two.

3. Promptly upon receiving the appellate court's tentative opinion in this appeal, issued on 9/21/1998, I organized and scheduled and participated in a series of strategy meetings and conferences with both Dr. Freeman and my co-counsel to prepare for oral argument. Some of these meetings lasted several hours as they involved extensive formulation of plans.

4. Approximately six weeks before the scheduled time for the hearing, we received notice that oral argument would be held on December 2, 1998. Our planning for oral argument intensified. We were all of the view that, given the tentative opinion, oral argument was of critical importance to the appeal, as it was the very much needed chance to educate the court about the case and illuminate the important elements of the appeal's background, and/or to otherwise engage the court in a

dialogue about the case.

5. We strategized and charted plans on how to best present oral argument within the limitations set by the court. The time originally allotted for oral argument (fifteen minutes) was very, very constraining under the circumstances, but we strained to do our best. It was decided that I would present the oral argument.

6. When the appellate court issued its November 19, 1998 order limiting oral argument to a mere ten (10) minutes, I promptly called the clerk of the court to ask whether the court would entertain a request for additional time. I was told no. The clerk advised me in no uncertain terms that any written request would be a waste of time.

7. Notwithstanding that advice, at the outset of my presentation of oral argument, I made an express plea for additional time for argument. The court firmly denied that request. The court asked no questions as to why I believed additional time was needed.

8. Given said unyielding restrictions I presented the main points of the perceived problems with the tentative opinion as best I could and tried to outline what I might have said had there been more time.

9. I purposely reserved two minutes for a reply argument. I used that reserved time to expressly outline, in very brief form, the points I would have liked to address in oral argument. I did not have time to even outline all the points I would have liked, and needed, to discuss.

10. Respondent's representation in his Answer to the Petition for Review that I made "absolutely no showing for the need of additional time" (Answer, 4:2-3) is, therefore, categorically false.

11. Not only was every effort made to show the court that more time for oral argument was needed and why, but the court specifically restrained me in the making of such a showing by advising me, from the outset, that my requests for more time would not be entertained.

I declare under penalty of perjury that the above is true and correct. Executed in Costa Mesa, California on February 18, 1999.

DAVID R. FLYER

As said above, throughout this case there are incidents of other deliberate falsehoods. Freeman's complaints regarding same have gone unheeded. The deceptions are significant and material. For example:

In discussing the applicability of the rule of *People vs. Hill* (1998) 17 Cal 4th 800 to the instant case concerning the unsettled issue of how claims of attorney misconduct that are raised for the first time on appeal are to be reviewed, Respondent makes much of the claim that *Hill* is to be distinguished on the ground that counsel in *Hill*, "objected to some of the instances of prosecutorial misconduct but did not do so in all cases (eitation omitted). In the case at bar, counsel for (Freeman) made absolutely no objections." [Answer, 19:17-20]. The discussion creates the false impression that Freeman's counsel objected to none of the complained of misconduct that occurred. In fact, Freeman's appeal briefs repeatedly point to examples where objections to alleged misconduct were raised and ignored -- albeit not to any alleged misconduct during closing argument. Whether the distinction that Respondent draws is significant to the issue at hand (the level of review a court must give to the claim that objecting would not have cured the problem) is a highly debatable point. But see, the extensive discussion in Freeman's briefs relating to the issue of attorney misconduct in securing the appointment of defense expert, Dr. Brantzawadzki. Freeman complained that counsel falsely claimed that Freeman had removed evidentiary X-rays from his doctor's office in order to fashion an excuse for the tardy request for the expert. [AOB 37, particularly fn.12, and 38-41, particularly, pg.40; and ARB 33]. Since Dr. Brantzawadzki was the only expert that testified against

Freeman, the deception is a highly material one. Note that the appellate court ignored the claim.

CONCLUSION

For all the reasons stated herein and in the Petition for Review NEAL S. FREEMAN, respectfully, requests that his petition be granted.

DATED: February 19, 1999

Respectfully submitted,
ERIKA W. SENTER, ESQ

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ERIKA W. SENTER, ESQ
Attorney for Neal S. Freeman

[indexes and exhibits omitted]